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ABSTRACT

Cases involving searches of public school pupils in order to obtain evidence of drug sales or use, and litigation challenging the punishments meted out to students found with drugs, continued to occupy the attention of courts in 1989. Also continuing a trend seen in previous years, religion-based challenges to state regulation of both home instruction and small private schools generated a high volume of cases. Finally, in the desegregation area, conflicting decisions again were issued by federal courts of appeal regarding the standards that lower courts should use in deciding if school districts had attained "unitary status." Cases are discussed under the following sections: (1) public school assignment, tuition, transportation, home instruction, and compulsory attendance; (2) private and parochial schools; (3) substantive rights of students, including search and seizure, and First Amendment religious and freedom of expression rights; (4) sanctions for student misconduct, including suspensions, expulsions, and corporal punishment; (5) bilingual and bicultural programs; and (6) desegregation, including cross-district remedies, desegregation plan oversight, and state court cases. (MLF)

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Henry S. Lufler, Jr.

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INTRODUCTION

Cases involving searches of public school pupils in order to obtain evidence of drug sales or use, and litigation challenging the punishments meted out to students found with drugs, continued to occupy the attention of courts in 1989. Also continuing a trend seen in previous years, religion-based challenges to state regulation of both home instruction and small private schools generated a high volume of cases. Finally, in the desegregation area, conflicting decisions again were issued by federal courts of appeal regarding the standards that lower courts should use in deciding if school districts had attained "unitary status."

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PUBLIC SCHOOL ASSIGNMENT, TUITION, AND TRANSPORTATION

Tuition and Assignment

Tuition and assignment cases generally involve disputes between school districts regarding the liability for the cost of educating students whose residence is not easily determined. One case heard in 1989 involved students whose parents were homeless and another involved students who were institutionalized for alcohol or other drug abuse. Other plaintiffs sought to enroll their children in school without securing vaccinations and another filed a challenge to an age requirement for kindergarten enrollment.

The children of a New York homeless mother who temporarily resided in a motel were denied admission at the school they had been attending on the grounds that the motel was outside the district boundaries. The children's father lived in the district but was no longer able to care for them because his landlord would evict him if they remained. While the state of New York subsequently enacted rules to cover such situations, giving homeless parents a choice of picking the district in which they resided currently or the one they had lived in when they became homeless, the rule was not in effect in time to cover the case at hand. After missing five days of school, the children were readmitted to the school they had been attending, and, with the passage of the new state rule, the substantive portion of the case was moot.

The plaintiff, however, continued the suit, seeking damages and attorneys' fees. The claim was based on the fact that the district had not followed its own rules requiring written notice following a determination of nonresidence.[1] Based on the failure to give notice, fees and damages for five days of missed school were sought. The court concluded that the actual harm for missing five days of instruction was equivalent to that which a student would suffer if the absence were due to the common cold. Nominal damages, however, are possible for a constitutional violation with a minimal impact and, since the notice had not been provided, the court awarded damages of one dollar, as well as the fees.

An Illinois court considered the question of who should pay the educational expenses for students living in a private residential center for the treatment of alcohol and other drug abuse.[2] The students

1. Harrison v. Sobol, 705 F. Supp. 870 (S.D.N.Y. 1988).
2. Doe v. Sanders, 545 N.E.2d 454 (Ill. App. Ct. 1989).

were enrolled in a regular public school program, receiving additional treatment and therapy at the institution outside the regular school day. Prior to 1987, the state had paid the education costs for such students. The state announced in the summer of 1987 that it would cease to provide the support, and the local district began to charge tuition for the institutionalized students whose homes were outside its boundaries. Several parents then filed suit against the state, asking that the state payments continue.

The case centered on the interpretation of the Illinois School Code that requires tuition payments by the state for children living in institutions who are "orphans, dependent, abandoned, or maladjusted." The plaintiffs argued that drug-dependent children were "maladjusted" under the terms of the code, and the state disagreed. The parents prevailed, with the court concluding that any "popularly understood interpretation" of the code provision would lead to the conclusion that chemically addicted children were "maladjusted." The tuition charges collected by the local district were ordered to be returned. The plaintiffs' attempt to secure attorneys' fees under section 504 of title 5 of the Rehabilitation Act of 1973[3] was rejected because the case hinged on the students' residence rather than any claim of disability or handicap.

A five-dollar-per-pupil fee assessed every six weeks by an Ohio school district to provide funds for the purchase of administrative supplies was challenged by a parents' group. The group sought a writ from the Supreme Court of Ohio to halt the charging of the fee, which was to be the second of two fees levied by the district. The district already charged parents a "classroom supply fee," a practice permitted by the state education code. While the district characterized its second fee as similar to the first, the Ohio high court concluded that the copier materials and record supply sheets that the new fees had purchased were administrative in nature.[4] Charging for administrative materials would violate the state free public education statute. While the state high court was precluded from issuing an injunction to stop the fee, it did issue a peremptory writ having the same effect. The writ required the district not to withhold student grades and credits if the fee was not paid.

What started as a modest case involving a tuition charge levied against a family whose new home was not completed on time ended with a finding that Maryland's nonresident tuition statute was un-

3. 29 U.S.C. § 794.

4. Association for the Defense of the Wash. Local School Dist. v. Kiger, 537 N.E.2d 1292 (Ohio 1989).

constitutional. A local board policy permitted the waiving of the nonresident tuition charge for families that were in the process of moving into the district. When the family's house was not completed by the time that the waiver specified, a tuition charge was assessed and the parents filed suit.

A state court sustained the tuition levy, and the parents appealed to the Maryland Court of Appeals. In assessing the case, the Maryland high court concluded that the case raised "issues of statewide significance," after it found that widely differing tuition policies were followed in different counties.[5] Some school districts routinely charged nonresident tuition while others did not. In addition, only some of them permitted waivers of nonresident tuition. Finding that state policies were unclear and that the state board had authority to promulgate rules in this area, the court gave the Maryland State Board of Education time to consider the new, uniform regulations. Pending the outcome of that review, the case at hand was remanded to the lower court.

The parents of an Illinois five-year-old sought to have their child admitted to kindergarten, even though his birthday fell five days after the statutory admission date. The child's father, an attorney, raised a variety of arguments regarding the powers of a school district to make an exception to the deadline. None of the plaintiff's interpretations of the state code was accepted by the court, which held that the district could admit the child if he were tested and found to be ready for school, but that the district was not obligated to conduct the test, as was asserted by the parents.[6]

Transportation

Cases involving transportation of children to private and parochial schools are discussed in a later section in this chapter. In this section, cases that focus solely on public school transportation issues are presented. In the single 1989 case falling in this category, a Connecticut parent sought to have a school bus drive to her home to pick up a child, rather than using an established stop. The plaintiff's argument centered on the fact that no other children were involved in the issue because the child was the only student waiting for the bus at that location. A lower court ruled against the parent and an appeals court sustained the decision, concluding that the parent was

5. Clinton v. Board of Educ. of Howard County, 556 A.2d 273 (Md. 1989).
6. Morrison v. Chicago Bd. of Educ., 544 N.E.2d 1099 (Ill. App. Ct. 1989).

not sufficiently "aggrieved" by the school district's decision, the burden that had to be met in order to prevail under Connecticut law.[7]

Home Instruction

State statutes regulating home instruction vary widely, ranging from a virtual ban on the practice in states that require all home instruction to be provided by a certified teacher to very permissive systems that require little more than the registration of students being educated at home. A variety of constitutional challenges are advanced each year in home instruction cases, including first amendment freedom of religion arguments and more unusual claims involving parental choice. In almost all instances, however, courts reviewing these sometimes emotional cases affirm state regulations that are designed to ensure that all children receive a basic education.

Home instruction cases frequently are of long duration and sometimes involve parallel actions in state and federal courts. In one such case, a federal district court in Michigan considered a number of issues raised by parents educating their children at home using materials purchased from a not-for-profit school.[8] At the heart of the parents' eight claims was their argument that any state regulation of home instruction must be by the least restrictive means and that there must be a compelling state interest to justify the intrusion of the state into the basic right of parents to educate their children.

Courts traditionally hold that education is not a fundamental right, requiring a compelling interest test to weigh government regulation. Instead, courts use the less rigorous rational relationship test to review the rules. The Michigan district court followed this approach in reviewing the case. The plaintiffs sought to convince the court that early Supreme Court cases establishing the right of parents to educate their children in private schools conveyed a parental right to educate their children at home.[9] The district court,

7. Blau v. State Bd. of Educ., 562 A.2d 586 (Conn. App. Ct. 1989).
8. Clonlara, Inc. v. Runkel, 722 F. Supp. 1442 (E.D. Mich. 1989).
9. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

however, concluded that no such fundamental right was conveyed in the cases and that private school cases might better be read as supporting the power of states to enact reasonable educational regulations.

The plaintiffs also sought to use *Wisconsin v. Yoder*[10] as authority for the parents' right to control the education of their children. *Yoder* involved the rights of Amish parents to terminate the education of their children after the eighth grade in order to control their religious upbringing. Courts, however, have been reluctant to expand *Yoder* to recognize religion-based exceptions to compulsory attendance laws advanced by non-Amish sects or by individuals with strongly held personal views. In the case at hand, the district court followed this trend, holding that the *Yoder* precedent centered on the religious upbringing of children, not their education.

In ruling against the plaintiffs on all counts, the district court also dismissed their claim that two teacher and administrator associations which had opposed home instruction had acted as official state agents that could be sued under 42 U.S.C. section 1983. The court also held that the eleventh amendment precluded all but injunctive relief from state officials and that the portion of the suit filed against the state superintendent also must be dismissed.

In a second Michigan case, this one heard by a state appeals court, the requirement that students who are educated at home be taught by a certified teacher again was upheld.[11] A similar result was obtained in 1986 when an evenly divided Michigan Supreme Court affirmed a lower court decision upholding the requirement.[12] In this latest case, the plaintiffs reported that they believed it would be a sin for them to submit to state authority by employing certified teachers. While admitting that the requirement did impose some burden on the plaintiffs' religious beliefs, the court characterized the burden as "minimal," pointing out that the plaintiffs were not precluded from hiring a certified teacher who conformed exactly to their religious perspective. The court also refused to use the compelling state interest test, holding instead that the requirement met the lesser rational relationship standard.

Maine's permissive statute on home instruction was challenged by parents who believed that any cooperation with a review of their home program would constitute a renunciation of their religious

10. 406 U.S. 205 (1972).
11. State v. DeJonge, 449 N.W.2d 899 (Mich. Ct. App. 1989).
12. Sheridan Road Baptist Church v. Department of Educ., 396 N.W.2d 373 (Mich. 1986), *cert. denied*, 481 U.S. 1050 (1987).

faith. Maine's home instruction statute permits home instruction if a student participates in annual standardized testing, or is reviewed annually by a certified teacher, or by a state or local home school advisory board. At one point, the plaintiffs in the case were given local approval after submitting materials to local school officials. They refused to accept it, however, asserting that their beliefs did not permit acceptance of any state approval.

The case continued, with Maine's high court finally concluding that universal education was "too precious" to allow some parents to "opt out, however high their motive."[13] The court held that the limited burden on the plaintiff's religious rights was outweighed by the state's interest in ensuring that all children received an education.

A Colorado intermediate court approved a home instruction program undertaken by parents who occasionally took their child to a private school for testing.[14] The Colorado home instruction statute permits home instruction by a certified teacher or after the home study program has been approved by the state. The wording of the state's private school statute, however, was changed in 1983. Prior to that time, the statute required students to "attend" such a school to satisfy state attendance requirements, but the language was changed to require that private school students be "enrolled." The court held that a student could be enrolled in the school without attending and allowed the home instruction to continue.

A Pennsylvania district court struck down that state's compulsory attendance law as being overly vague but stayed its ruling in the case to allow the state education secretary to promulgate new rules regarding the approval of home instruction programs.[15] The disputed statute permitted local school officials to allow "properly qualified private tutors" to provide home instruction, so long as "instructional standards" established by local school officials were met. This led to a wide variety of different school policies on home schooling which, the court concluded, violated the due process rights of the plaintiffs. In other states where local review of home instruction programs has passed constitutional muster, clearly detailed state rules govern the local review.

Finally, North Dakota parents asserted that public school officials were so biased in judging their request for an exemption from the compulsory attendance requirement for their daughter that their due process rights were violated.[16] The parents had applied for

13. Blount v. Department of Educ. & Cultural Servs., 551 A.2d 1377 (Me. 1988).
14. *In re* D.B., 767 P.2d 801 (Colo. Ct. App. 1988).
15. Jeffery v. O'Donnell, 702 F. Supp. 516 (M.D. Pa. 1988).
16. State v. Brewer, 444 N.W.2d 923 (N.D. 1989).

the exemption under both the "economic hardship" and "physical or mental condition" sections of the state compulsory attendance law. Both claims had been denied. The North Dakota court refused to find that the district's slight economic interest, in the form of state per-pupil aid, caused the administrators to be biased.

Compulsory Attendance

Immunizations are required in all states prior to a child's entrance into public schools. The laws of the states contain exemptions for children residing in homes where the parents' religious beliefs preclude immunization, though the outbreak of a communicable disease can be grounds for asking the parents to withdraw their child. In recent years, cases have been filed by parents seeking to enroll their children without the required vaccinations who are not members of organized religions but who cite their personal religious beliefs as justification for an exception to the requirement. Such claims have been subject to close scrutiny by courts, and the parents do not always prevail.

The parents of a New York child sought such an exception and their request was denied. They then filed suit in federal court.[17] While the parents had spent years exploring various faiths, they belonged to no organized church. They were not opposed to all medical procedures and would accept injections to cure disease, but argued that their beliefs precluded them from "anticipating being ill." Confounding their claim, however, was the fact that their child three times had received a preventive oral polio vaccine. This was done, the parents testified, because one of the child's grandparents had insisted on providing the child with the protection. In spite of this damaging admission, the court ruled that the parents' beliefs were sufficiently strong that their religious rights would be infringed upon if the child were denied enrollment. For turning away the child on the first day of school, the school was required to pay the parents $1,000 in damages.

Attorneys' fees were the only question before a district court in another New York vaccination case.[18] Plaintiffs in the case had successfully challenged New York's statute that only members of organized religions could receive an exemption from the vaccination requirement. The court ordered fees and costs of approximately $7,500

17. Lewis v. Sobol, 710 F. Supp. 506 (S.D.N.Y. 1989).
18. Levy v. Northport-East Northport Union Free School Dist., 708 F. Supp. 511 (E.D.N.Y. 1989).

to be evenly divided between the state and local district. The district argued unsuccessfully that it was only carrying out state policy and should be exempted from the payment.

In a more traditional compulsory attendance case, parents whose child had missed in excess of fifty days of instruction sought to avoid having their child declared to be in need of judicial supervision. The parents argued unsuccessfully that the school district had an obligation to notify them in writing which school the child was to attend and that the school had the burden of showing that the numerous absences were intentional.[19]

North Dakota parents claimed that they should be able to file a judicial appeal of their state superintendent's administrative decision not to exempt their child from compulsory attendance laws. The Supreme Court of North Dakota held that there could be no direct appeal of the superintendent's decision.[20] The parents had raised no legal challenge to the decision, but had argued that they were entitled to a *de novo* review of the action.

PRIVATE AND PAROCHIAL SCHOOLS

Private and parochial school cases fall into two general groups, both of which are represented in 1989 cases. The first group consists of challenges made to the provision of publicly financed materials or services to private school students, such as bus transportation or textbook loans. The second group of cases involves challenges raised regarding private school contracts with parents and the removal of students from such schools.

Massachusetts law gives local school districts the power to approve the secular course content of private schools within their district boundaries. In a case reported last year, a Massachusetts federal court set limits on the methods that districts could employ in the review process, holding that public school district officials could not visit the private school or examine curricular materials without violating the free exercise and establishment clause of the first amendment.[21] A private academy had asserted that it was a sin to submit their academic program to a public agency for approval and the court ruled that the voluntary use of standardized test scores their academic program to a public agency for approval and the court ruled that the voluntary use of standardized test scores repre-

19. *In re* Anthony C., 541 N.Y.S.2d 291 (Fam. Ct. 1989).
20. Van Inwagen v. Sanstead, 440 N.W.2d 513 (N.D. 1989).
21. New Life Baptist Church Academy v. Town of East Longmeadow, 666 F. Supp. 293 (D. Mass. 1987); *see* The Yearbook of Education Law 1988 at 73-4.

represented a constitutionally required less burdensome method of carrying out the required program approval.

The case was appealed to the First Circuit Court of Appeals, which overruled the district court.[22] The appeals court began its analysis of the case by first concluding that the free exercise clause did not preclude the state from requiring the program approval. The court held that the state had a compelling interest in ensuring that all children received an adequate education.

The lower court's ruling that the first amendment required the use of standardized tests or some other less-intrusive method to satisfy the state's interest received the bulk of the appeals court's attention. The court concluded that the use of the scores would "materially detract" from the state's effort to monitor the students, since test scores would report an after-the-fact failure of the educational program. The court observed that using tests also would involve the private academy in the same state approval process to which it objected in the first place, pointing out that the issues of test selection and score interpretation also would involve contact with public officials to resolve. Ultimately, the court concluded, it would be unworkable if every religious group could select the means for assessing its own programs. The appeals court quoted a recent Supreme Court decision, observing, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[23]

The loan of textbooks by public school systems to students enrolled in private schools was the subject of a Nebraska court test in 1989. The Nebraska legislation,[24] enacted in 1987, permitted the parents of private school children to make individual requests to local school officials and then to receive the textbooks. The Lincoln public schools refused to comply with a parent's request, and a legal challenge to the constitutionality of the law resulted.

The United States Supreme Court has upheld the constitutionality of textbook loan programs in the face of federal first amendment challenges,[25] so the issue for the Nebraska Supreme Court involved state constitutional issues. The Nebraska court, pointing to its previous decisions approving transportation assistance and student financial aid, held that the state constitution permitted the

22. New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940 (1st Cir. 1989).

23. Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1327 (1988).

24. Neb. Rev. Stat. § 79-4, 118 (Reissue 1987).

25. Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977).

textbook loan.[26] The court also refused to find that the statute was unconstitutionally vague.

The parents of a student who was expelled from a Florida private school sought to recover part of the education costs they had paid to the school. The contract they had signed provided that the full charge for tuition, room, and board would constitute liquidated damages payable to the school in the event of expulsion. In spite of the fact that most holdings in previous cases of this type supported the school's claim for full payment, a state appeals court remanded the case to determine if a replacement student had been found for the expelled student.[27] If a replacement had been found, the court held that some credit for the replacement's revenue should be given.

Taxpayers who were successful in challenging their local district's payment of transportation costs for private school students brought suit seeking attorneys' fees.[28] While the plaintiffs had raised a variety of constitutional challenges to the transportation payment, they prevailed when a Massachusetts court ruled that the payment had been rescinded at a town meeting. The court had declined to reach the constitutional issues, and the school district refused to pay the fees, arguing that no payment was required when a party prevailed on the basis of a statutory interpretation. The appeals court disagreed, holding that the statutory claim was sufficiently intertwined with constitutional issues and that the plaintiffs therefore were entitled to fees.

SUBSTANTIVE RIGHTS OF STUDENTS

Search and Seizure

Attempts to control the use of drugs by students and to curb the sale of controlled substances on school premises continue to generate a significant number of search and seizure cases. School search and seizure cases rely heavily on the holdings in the Supreme Court's 1985 decision in *New Jersey v. T.L.O.*.[29] *T.L.O.* involved the search of a student's purse for cigarettes. When marijuana and evidence that the student had been selling the drug in school were uncovered, sanctions were imposed and the student's attorney sought

26. Cunningham v. Lutjeharms, 437 N.W.2d 806 (Neb. 1989).
27. Perez v. Aerospace Academy, Inc., 546 So. 2d 1139 (Fla. Dist. Ct. App. 1989).
28. Cronin v. Town of Tewksbury, 538 N.E.2d 22 (Mass. 1989).
29. 469 U.S. 325 (1985).

to have them rescinded, arguing that the search violated the fourth amendment. The Supreme Court rejected the claims filed on behalf of the student, affirming the principle that a school search could be conducted based on "reasonable suspicion" and directing that the methods used in school searches must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[30]

Courts tend to weigh the reasonableness of searches by considering the methods employed and the extent to which the search is personally intrusive. Stricter review standards are applied when the student's clothing or body is being examined and lesser standards when the search involves a locker or car parked on school grounds. These issues were debated in a case that reached the Fifth Circuit Court of Appeals. The defending school district employed sniff dogs in a well-publicized attempt to control the bringing of narcotics to school. The dogs were used only in the school's parking lot. Under the school's well-publicized policy for these vehicle searches, the student driver would be summoned and asked to open the car when a dog alerted next to it. If the student refused to unlock the car, a parent would be summoned; if the parent also refused, the police would be called.

These steps were followed and, when the police arrived, the student's father refused to give his consent for the search. A police officer then took over the management of the issue and the school officials "stepped aside." The officer questioned the dog's handler regarding the dog's sniffing skills and sought advice from the county attorney. A probable cause determination was received from a judge, who then issued a warrant. Nothing was found in the car. The parent then filed a suit against the school and the police officer. A district court dismissed the complaint against school officials and the dog handlers, and a jury returned a verdict in favor of the police officer. The parent appealed and the appeals court sustained the lower court's dismissal of all of the constitutional claims advanced by the father.[31]

The appeals court also considered the lower court's unusual application of the damages provisions in 42 U.S.C. section 1988 and under rule 11 of the Federal Code of Civil Procedures. Rule 11 penalizes attorneys for pursuing frivolous claims. The lower court determined that the plaintiffs had violated rule 11 by continuing to

30. *Id.* at 336.

31. Jennings v. Joshua Indep. School Dist., 869 F.2d 870, *superseded*, 877 F.2d 313 (5th Cir. 1989).

include the school system in the litigation when it was "obvious" that the school was not involved in the actual search. The lower court awarded fees to the prevailing school system on the ground that all of plaintiff's claims, except those directed at the police officer, were frivolous and constituted harassment. The district court had observed that the father did not believe, and had even testified to the fact, that the school officials had played a significant role with the search.

The Fifth Circuit at first sustained the lower court attorneys' fee ruling, agreeing with the plaintiff's rule 11 challenge. The appeals court then reconsidered its decision on the matter and published a second opinion a few months later. The last paragraph of the first opinion was modified to remand the portion of the case related to the fees. The lower court had awarded $84,000 to the defendants, and the appeals court asked the lower court to reconsider this sum in light of an intervening Fifth Circuit decision calling for "more rigorous" review of large sanctions.[32]

Damages also were sought in a Tenth Circuit case involving the seldom-litigated claim of improper seizure.[33] Upon receiving statements from two students implicating a third student in a phoned bomb threat, a principal summoned the plaintiff to his office where a twenty-minute interrogation of the student occurred. The student's counsel attempted to convince the appeals court that the interrogation denied the student both liberty and property interests to such an extent that the fourth amendment ban on unreasonable seizure had been exceeded. Applying *T.L.O.* to the seizure case, the appeals court held that the brief questioning was "reasonably related" to the scope of the offense and ruled against the student on all issues.

Drug tests involving the use of urine or blood samples constitute a search under the terms of the fourth amendment. In 1988, a court upheld the use of urine tests for students wishing to participate in interscholastic athletics.[34] The district court departed from the requirement of individualized suspicion that was the hallmark of previous drug test cases, concluding that the use of testing only to determine eligibility for athletic participation distinguished the case at hand from other decisions. In late 1988, the Seventh Circuit affirmed the lower court decision.[35] The appeals court held that suspicionless searches must meet a higher standard of review. When fail-

32. Thomas v. Capital Security Servs., Inc., 836 F.2d 866 (5th Cir. 1988).
33. Edwards v. Rees, 883 F.2d 882 (10th Cir. 1989).
34. Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833 (N.D. Ind. 1988); *see* The Yearbook of Education Law 1989 at 71-2.
35. Schaill v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988).

ing the test, however, only meant missing a few sporting events, the court held that instituting the test program did not violate the fourth amendment.

A Texas district court considered the need for individualized suspicion in a more omnibus student drug testing program and reached the opposite conclusion, concluding that a school district's program violated the fourth amendment.[36] The program required all students who wished to participate in any extracurricular activity to submit to a urine test. More than half of the student body therefore would be involved. In reviewing the program, the court found that it differed significantly from the Seventh Circuit case just discussed, which was much more narrow in scope. The court also suggested that two Supreme Court cases concerning drugs in the workplace,[37] handed down after the Seventh Circuit case, established a compelling interest standard not met by the school district's policy. Therefore the court enjoined the district from continuing its program.

A search of a purse owned by a Florida student, undertaken to find a knife, turned up cocaine instead. The student was searched when school officials received a report that she would bring the knife to school for use in a fight. The cocaine was discovered in a small plastic envelope in a zippered pocket within the purse. Attorneys for the plaintiff argued successfully that the search was unreasonable, since the tiny pocket where the drug was found was far too small to contain a weapon.[38] The appeals court characterized the search of the pocket as a "scavenger hunt." The facts of the case, however, bear a strong resemblance to those in *T.L.O.*, where the search of a purse continued after the principal had found the cigarettes for which he initially was searching.

The American Civil Liberties Union, legal counsel in several of the cases already discussed in this section, was the plaintiff in a Rhode Island case challenging the closed meetings held by a school board.[39] The meetings were closed in order to allow the board to plan the search of 800 student lockers by state and local police. The Rhode Island Supreme Court affirmed a lower court ruling that the closed meetings were permitted under a portion of the state open meeting law allowing the discussion of "security matters" in closed session.

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36. Brooks v. East Chambers Consol. Indep. School Dist., 730 F. Supp. 759 (S.D. Tex. 1989).
37. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989); National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989).
38. T.J. v. State, 538 So. 2d 1320 (Fla. Dist. Ct. App. 1989).
39. Rhode Island ACLU v. Bernasconi, 557 A.2d 1232 (R.I. 1989).

First Amendment Religious Rights

Cases in which there is a claim that the first amendment establishment clause has been violated rely on the "test" established in *Lemon v. Kurtzman.*[40] A school policy can be upheld only if it satisfies each of three conditions. It must have a secular purpose, must neither advance nor inhibit religion, and must not foster excessive state entanglement with religion. Courts hearing most of the cases reported in this section applied the *Lemon* test to the facts of the cases they were considering. Courts reviewing school policies that allow invocations prior to commencement ceremonies or athletic events sometimes consider the Court's holding in *Marsh v. Chambers,*[41] a case that upheld the religious invocations that precede the daily meetings of the United States House and Senate.

Religious rights cases heard in 1989 covered a wide range of issues. Challenges were filed to special event invocations, to the rental of space in religious schools by public school systems, and to the use of school space by religious-based student groups before school and during activity periods. Less traditional issues also were considered. A federal court of appeals reviewed a ban on dancing that had been enacted by a school system, and district courts heard arguments in separate cases challenging a state flag salute statute and the right of a teacher to read the Bible during the school day.

The Ninth Circuit Court of Appeals weighed the first amendment claims of a student religious group that sought to use a classroom for before-school prayer. A district court had held that the use of the room would violate the establishment clause and that there was no violation of the Federal Equal Access Act[42] by the ban on the use of the room.[43] The lower court concluded that the prayer meetings would violate two prongs of the *Lemon* test by advancing religion and by fostering government entanglement with religion. The appeals court agreed, concluding that the use of the room was unrelated to the school's curriculum and would improperly use a tax-supported facility and involve staff supervision.[44] The appeals court also supported the lower court's ruling that the Access Act did not

40. 403 U.S. 602 (1971).
41. 463 U.S. 783 (1983).
42. 20 U.S.C.A. § 4071 *et seq.* (West 1985).
43. Garnett v. Renton School Dist. No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987); *see* The Yearbook of Education Law 1989 at 75.
44. Garnett v. Renton School Dist. No. 403, 865 F.2d 1121, *superseded,* 874 F.2d 608 (9th Cir. 1989).

apply because all of the existing school clubs were directly related to the school's curriculum.

A different conclusion was reached in a second Access Act case. The Act requires schools to make space available to religious-based school groups if the school has created an "open forum" or a "limited open forum" by allowing other groups unrelated to the curriculum to meet. The Eighth Circuit Court of Appeals reversed a district court decision that had concluded that thirty clubs meeting in a Nebraska school all were related to the curriculum.[45] The lower court, in a slip opinion, had upheld the school administrators' decision not to allow the Bible club to meet during the after-school period. The lower court accepted the school system's argument that a chess club, scuba club, and two groups sponsored by Rotary International were directly related to the school's official program of instruction. The appeals court concluded that the Access Act would be rendered meaningless if such a broad definition of "curriculum" were adopted.

A school system ban on dancing also was considered by the Eighth Circuit. The ban prevented dancing on school premises, though "unofficial" school dances occurred elsewhere. After a strong community outcry from fundamentalist religious groups in favor of keeping the ban, the system board of education refused to change the policy and a lawsuit followed. Plaintiffs in the case argued successfully before a district court that the policy served no secular purpose, thereby violating the establishment clause.[46] The appeals court reversed, concluding, "[t]he mere fact a governmental body takes action that coincides with the principles or desires of a particular religious group . . . does not transform the action into an impermissible establishment of religion."[47]

The rental of parochial school space for classroom purposes by public schools is sharply limited. The Supreme Court has held that the use of such space would convey the image to "impressionable" school children that there was a union between church and state.[48] In a case raising this issue, the rental of parochial school space by a Massachusetts school district was challenged in a federal district court by parents who objected to having their children in the school.[49] The lease itself was challenged because its terms required

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45. Mergens v. Board of Educ. of Westside Community Schools, 867 F.2d 1076 (8th Cir. 1989).

46. Clayton v. Place, 690 F. Supp. 850 (W.D. Mo. 1988); *see* The Yearbook of Education Law 1989 at 74.

47 Clayton v. Place, 884 F.2d 376, 380 (8th Cir. 1989).

pids School Dist. v. Ball, 473 U.S. 373 (1985).

Bridgewater School Dept., 722 F. Supp. 834 (D. Mass. 1989).

that the space could not be used in any way "inconsistent with the teachings of the Roman Catholic Church."

A challenge also was raised to other aspects of the arrangement. While the most obvious religious symbols in the rented classrooms were covered with cloth, other symbols remained in hallways and at entrances. In addition, a priest welcomed the students at the door of the school on most mornings. The district court held that the rental represented an entanglement between church and state and granted a preliminary injunction to the parents ordering the public system to allow students to be reassigned. The court also gave the defendants a short period to respond before it would consider issuing a summary judgment on the other issues raised by the plaintiffs.

The United States Supreme Court ruled in 1943 that local school authorities could not require students to participate in a flag-salute ceremony or to recite the Pledge of Allegiance.[50] An Illinois statute, however, requires the daily reciting of the pledge by pupils in elementary schools.[51] The plaintiffs challenging this statute, members of the Society of Separationists, did not wish their children to participate in the salute. They raised an establishment clause challenge to the words "under God" in the pledge and argued that their free exercise rights were curbed by the statute.

An Illinois district court rejected a motion by the defending school district that the case be dismissed.[52] The court held that the plaintiffs stood little chance of succeeding with their challenge to the wording of the pledge, which has been upheld on numerous occasions. But the court was unimpressed with the school district's attempt to distinguish the case at hand from the Supreme Court's flag-salute decision in 1943. The district argued that the lack of a penalty clause in the Illinois statute rendered participation voluntary, but the court observed that school disciplinary proceedings could be invoked against children failing to participate.

A variety of first amendment religious issues were mingled with arguments regarding academic freedom in a case heard by a Colorado district court.[53] The plaintiff, a fifth-grade teacher, kept a Bible in full view on his classroom desk and read silently in it during the class "free reading" period. He also had placed books about the Bible and Jesus in his classroom library. A lawsuit commenced when the school's principal asked the teacher to remove the books from the

50. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
51. Ill. Rev. Stat. ch. 122, § 27-3 (1980).
52. Sherman v. Community Consol. School Dist. 21, 714 F. Supp. 932 (N.D. Ill. 1989).
53. Roberts v. Madigan, 702 F. Supp. 1505 (D. Colo. 1989).

library, and to place the Bible inside his desk and to refrain from reading it during the school day.

The district court upheld the principal's actions in the case, holding that they promoted the religious neutrality that is mandated by public school establishment clause cases. Observing that impressionable fifth graders would receive a religious message if their teacher read only the Bible during the reading period, the court also concluded that it was within the school's discretionary powers to order a halt to the practice. On the claim that the teacher's academic freedom was curbed, the court held that the "natural tension" present when the free speech and establishment clauses conflict must, in this case, be resolved by limiting the teacher's autonomy.

Challenges to invocations before athletic events or commencement ceremonies have ended with mixed results. Pregame invocations in a Georgia district that sometimes closed with the words "in Jesus' name we pray" were the subject of a case heard by the Eleventh Circuit Court of Appeals.[54] The school system had sought to implement an "equal access" plan that would involve members of the community offering "inspirational messages" before games, but the proposal found the support of only one of the three jurists hearing the case. The majority held that the "equal access" scheme was merely a subterfuge for continued religious messages, observing that the district had refused to implement a policy that only secular invocations would be used. The majority also refused to find that *Marsh* provided support for the practice of offering prayers, suggesting that while prayers were present at the start of legislative sessions at the time the United States Constitution was ratified, football pregame prayers were not. Attorneys' fees also were sanctioned in the case.

Prayers before and after high school commencements were approved by a California state court, in the face of both federal and state constitutional challenges.[55] Using the *Lemon* test, the appeals court concluded that the prayers were used for a secular purpose, since they were designed to establish a solemn tone for a secular occasion. The court concluded that the invocation policy could pass muster even though the messages were not "exclusively" secular. The United States Supreme Court has never resolved the conflict among jurisdictions regarding the constitutionality of commencement prayers.

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54. Jager v. Douglas County School Dist., 862 F.2d 824 (11th Cir. 1989).
55. Sands v. Morongo Unified School Dist., 262 Cal. Rptr. 452 (Ct. App. 1989).

A New York appeals court considered a challenge brought against that state's requirement that all public school children receive instruction with regard to AIDS and alcohol and other drug abuse.[56] The plaintiffs argued that their free exercise rights were violated and that such instruction was inherently "evil." The court disagreed, observing that students could be excused from the "prevention" portion of the AIDS curriculum. It concluded that the state had a compelling reason for the instruction while the plaintiffs lost no significant religious freedom.

A Florida local government resolution, passed by a city council and signed by the mayor, urging residents to participate in a day of "nondenominational, voluntary prayer" in support of the city's anti-drug efforts was challenged in federal court.[57] Schools were targeted in the resolution, and the attack on the prayer day focused in part on the constitutionality of asking school children to pray. No public funds were expended in the program, and the resolution also urged citizens to meditate or engage in "other appropriate solemn dedication." Given the breadth of the resolution and its lack of coercion of any kind, the court dismissed the plaintiff's request for an injunction stopping the program.

First Amendment Freedom of Expression

The United States Supreme Court decision in *Hazelwood School District v. Kuhlmeier*[58] continued to dominate expression cases in 1989. *Hazelwood* involved the deletion by a principal of two pages of a high school newspaper that contained stories about student pregnancy and drug use. The paper, which was produced as part of a journalism class, was published with two blank pages. In upholding the principal's action, the Court concluded that the paper was not a forum for public expression and went on to find that "educators do not offend the first amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[59]

What constitutes "legitimate pedagogical concerns" was broadly applied by lower courts in 1989, with the regulation of student expression being upheld in a number of cases. In a case heard by the Ninth Circuit Court of Appeals, Planned Parenthood lost in

56. Ware v. Valley Stream High School Dist., 545 N.Y.S.2d 316 (App. Div. 1989).
57. Allen v. Consolidated City of Jacksonville, 719 F. Supp. 1532 (M.D. Fla. 1989).
58. 484 U.S. 260 (1988).
59. *Id.* at 273.

its attempt to force the publication of family planning advertisements in a school system's student newspapers, yearbooks, and athletic event programs.[60] The plaintiffs alleged that the publications were public forums, but the appeals court rejected the argument, holding instead that the acceptance of some advertising did not necessarily create an open forum. Citing *Hazelwood,* the court concluded that school districts had "wide latitude" to control the content of school-sponsored publications and that it was reasonable for the district to conclude that the ads were incompatible with the educational mission of the schools.

A student running for student council president in a Tennessee school made fun of an administrator while delivering a student assembly speech and was removed from the ballot by the school's principal. A district court ruled that the student's first amendment rights had not been violated and the Sixth Circuit upheld the decision.[61] Citing *Hazelwood,* the appeals court majority concluded that the school was exercising appropriate control over student expression in a school-sponsored event.

In dissent, one judge hearing the case observed that the speech contained no invasion of student privacy, the issue that was central in *Hazelwood.* The dissent then relied heavily on *Tinker v. Des Moines Independent School District,*[62] a case involving the wearing of a protest armband. *Tinker* established a "material disruption" standard under which student expression could be limited. The requirement that material disruption be reasonably forecast runs counter to the thrust of the more recent *Hazelwood* ruling. In the case at hand, the dissenting judge argued that the student's nominating speech could not be suppressed because it was purely political in nature and caused no disruption.

The *Tinker* disruption argument also was used in two cases that involved the proposed distribution of a magazine published by a national group, Student Action for Christ. The fact situations in the two cases were similar. In each, students were prevented from distributing the magazine and a lawsuit followed. In the first case, a rule that limited the time and place of the distribution was upheld in the face of a *Tinker* argument presented by the plaintiffs that they should be free to distribute the magazine at will, so long as no dis-

60. Planned Parenthood of Southern Nev., Inc. v. Clark County School Dist., 887 F.2d 935 (9th Cir. 1989).
61. Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989).
62. 393 U.S. 503 (1969).

ruption occurred.[63] In the second, an absolute ban on the distribution of religious publications, enacted by a school district, was held to be unconstitutional.[64] Again, however, the claim by the plaintiffs that they should be able to distribute without time and place limits was rejected.

The attempt by the board of education and school officials in Atlanta to regulate speakers at a career day returned to the Eleventh Circuit. The litigation started in 1984 and so far has resulted in five published decisions. A 1988 federal court decision held the district's policies regulating who could participate in the career day were designed to exclude peace activists who wished to offer their point of view about military service as an occupation.[65] The court decided that this viewpoint discrimination violated the first amendment. On appeal, the Atlanta system argued that *Hazelwood* gave the district the power to control the career day program content. The appeals court disagreed, holding that once the system had opened a topic for discussion by outsiders it could not reasonably prohibit an opposing point of view from being heard.[66]

Issues surrounding the removal of books from school libraries and curriculums were heard by two California courts of appeal. A California school board voted to remove books written by poet and novelist Richard Brautigan from the school library, and a teacher whose students were reading the books as part of a high school class brought suit to stop their removal. An appeals court declined to rule on a host of constitutional challenges, instead deciding the case on an interpretation of state law. The court held that California statutes gave the school boards of the state the power to create school libraries but did not contain the authority to remove books from them.[67] The court's holding is reminiscent of a scattering of school library cases from a decade ago that held that library books once selected acquired "shelf tenure" and could not be removed.

In the second California case, a school board removed *Grendel*, by John Gardner, and *One Hundred Years of Solitude*, by Gabriel Garcia Marquez, from the school's English curriculum. In the case of the Gardner novel, all the parents of students in a senior-year English class had signed a slip granting permission for their children

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63. Nelson v. Moline School Dist. No. 40, 725 F. Supp. 965 (C.D. Ill. 1989).
64. Rivera v. East Otero School Dist. R-1, 721 F. Supp. 1189 (D. Colo. 1989).
65. Searcey v. Crim, 681 F. Supp. 821 (N.D. Ga. 1988); *see* The Yearbook of Education Law 1989 at 78-9.
66. Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989).
67. Wexner v. Anderson Union High School Dist., 258 Cal. Rptr. 26 (Ct. App. 1989).

to read the book. The appeals court held that *Hazelwood* gave school officials broad power to make decisions about the appropriateness of curricular materials, but also noted that these decisions must be based on what the decision referred to as "legitimate pedagogical concerns." Finding that the record was incomplete concerning the motives of the board for excluding the books, the court remanded the case for a determination of the board's motives.[68]

SANCTIONS FOR STUDENT MISCONDUCT

This section is divided into three parts. Challenges to student suspensions and expulsions are discussed in the next portion, and those questioning the use of corporal punishment are detailed in the third. In this introduction, unusual cases that argue issues associated with other disciplinary penalties are reported. The three 1989 cases that fall into this category all were heard by federal courts of appeal. They raise unusual issues — the denial of permission to participate in an instructional program based on an unwritten "good citizenship" rule, the "crediting" of the time taken by disciplinary hearings toward the penalty imposed, and the denial of federally funded school lunches to students serving in-school suspensions.

The Eighth Circuit Court of Appeals heard a challenge to a school district's unwritten "good citizenship rule" that was invoked to prevent a student from entering an off-campus vocational program.[69] Also considered in the case was the fact that the student would be allowed to participate upon paying $1,375 in tuition. The district's denial of the student's participation was challenged on equal protection grounds, based on the fact that only students from poor families would be excluded.

The student was studying auto mechanics in the off-campus program and was not allowed to continue when he was found guilty of a theft charge that involved stolen auto parts. The student was placed on probation for the theft, which occurred at a site different from the vocational school where he was studying auto repair. A divided appeals court sustained the school's action. The majority concluded that "adjudicated juvenile delinquents" were not a suspect class for the purpose of equal protection analysis and that the school's denial was based on "legitimate school objectives."

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68. McCarthy v. Fletcher, 254 Cal. Rptr. 714 (Ct. App. 1989).
69. Felton v. Fayette School Dist., 875 F.2d 191 (8th Cir. 1989).

In a sharply worded dissent, the dissenting judge refused to characterize the school's decision as having been based on a "rule" that, in fact, did not appear in the school's curriculum handbook. Because no such "rule" actually existed, the dissent argued that the majority had constructed and decided a "hypothetical case" that was not supported by the record. The dissenting judge argued that the tuition requirement constituted an "arbitrary sanction" and that the school district's decision had created a situation where "rich, delinquent students will not be deprived of their right to educational benefits, but poor, delinquent students will."[70]

The Bridgeport, Connecticut school system was accused of violating a state law that establishes 180 days as the maximum suspension period that can be invoked in a disciplinary proceeding. Counsel for a student who brought a loaded gun to school in order to sell it to another student brought the suit, arguing that the student should receive credit for the days the student was out of school waiting for the case to be resolved. It also was argued that the school system had an obligation to tell the plaintiff's counsel that the delays the counsel was seeking during the hearing process would not be credited toward the 180-day penalty.

The Second Circuit Court of Appeals rejected the plaintiff's claims.[71] The appeals court concluded that the plaintiff had failed to appeal the decision of the board denying the time served under state administrative procedures and that the board had offered sufficient justification for its decision, such that it could not be shown that the decision was arbitrary. The district had argued that the allowance of the time served would return the student to school in March, too late in the academic year for the student to make meaningful progress.

A Michigan school district enacted an in-school suspension policy that would cause some students to be denied their federally funded school lunch. After objections to the policy were filed, the district modified its terms. Under the revised policy, students were allowed to eat their lunch in the company of a parent, or could be sent home if no parent was available. A legal challenge to the use of a federally funded meal program as a school disciplinary sanction then was initiated. Federal rules were introduced before the district court; the rules stated that the use of meal denials in a "disciplinary action" was "inconsistent with the law."

A lower court decision in favor of the plaintiffs, based on the lunch program rules, was overturned by the Sixth Circuit Court of

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70. *Id.* at 196.
71. Rosa R. v. Connelly, 889 F.2d 435 (2d Cir. 1989).

Appeals. The appeals court failed to reach the major issues in the case, concluding instead that the plaintiffs lacked standing to bring suit.[72] Standing was lacking, the appeals court concluded, because the plaintiffs had failed to show that the injuries they claimed they would suffer would be redressed by the requested relief. The district's alternative penalty for rule infractions, the court reasoned, would be for the district to suspend students for an entire day. This too would have the effect of denying a student the subsidized lunch. The plaintiffs were invited to challenge the lunch penalty by seeking relief from the United States Department of Agriculture or from the Michigan Department of Education.

Suspensions and Expulsions

The suspension and expulsion cases that follow rely heavily on the holdings of the Supreme Court in *Goss v. Lopez*.[73] *Goss* established the requirement that students could not be subjected to short suspensions from school, lasting ten days or less, without receiving a brief hearing. The hearing must afford the student an opportunity to learn why a suspension is occurring and the student must be given a chance to tell an administrator his version of the event. Additional due process is required for suspensions in excess of ten days. Charges that the hearing a student received was faulty are made in almost all suspension and expulsion cases.

In a case heard by a federal appeals court, the father of a student who was suspended from school for ten days and from the football team for sixty days claimed that the extracurricular penalty required a hearing more elaborate than the one he had received. The court disagreed.[74] The parents did not contest the ten-day academic suspension after their son admitted he smoked marijuana and drank beer in the school radio station. The parents, however, only found out at a board of education meeting discussing the first suspension that the extracurricular penalty also was being considered. The father was given thirty minutes to argue that the penalty was excessive before the board approved it.

The appeals court concluded that the father's appearance before the board satisfied the *Goss* hearing requirement and that nothing in *Goss* required the school district to detail the possible penalties that might be imposed by a board at a hearing. The court majority also refused to find that the student had a property right that was

72. Heimberger v. School Dist. of Saginaw, 881 F.2d 242 (6th Cir. 1989).
73. 419 U.S. 565 (1975).
74. Palmer v. Merluzzi, 868 F.2d 90 (3d Cir. 1989).

implicated by his removal from the football team. In dissent, one of the judges hearing the case argued that sport participation was rapidly moving from being a "privilege" to being a "right." The dissent concluded that the student had, indeed, lost a significant property right, perhaps a football scholarship that would be his "only avenue to a higher education."

Courts generally have protected the identity of student informants in cases where the information they provide leads to school disciplinary penalties. This issue again was argued in a case heard by the Sixth Circuit.[75] A student was given a ten-day suspension for offering to sell another student a white powder that was advertised as cocaine. The powder, however, was a harmless "look-alike" substance. The student's suspension was based on evidence contained in a written statement made by an unnamed student. The suspended student's counsel was not given the opportunity to see the statement or to cross-examine the student making it.

The student's attorney sought the right to cross-examine the student providing the statement, citing a sentence in the *Goss* decision as authority for the request. The sentence reads, " in unusual situations, although involving only a short suspension, something more than rudimentary procedures will be required."[76] It was argued that a drug charge of the sort being made was so stigmatizing to the student's future career that it represented an "unusual situation" of the sort described. The court disagreed, holding that a ten-day suspension of an eighth-grade student would not lead to the future consequences described by the student's counsel.

The attorney representing a student given a ten-day suspension by his principal for assaulting another student and an additional ten-day suspension by the district superintendent for the same offense claimed that the student should have been afforded additional due process.[77] The student had injured a classmate while they were fighting by using a strip of leather in which carpet tacks had been embedded. Prior to the superintendent's decision, a hearing at which the student was represented by counsel was held. A state appeals court concluded that more than adequate due process had been afforded by the hearing for a suspension that totaled twenty days.

A high school senior visiting a college with his parents consumed a beer with his lunch, returned to school in time to attend wrestling practice, and was suspended from school when a coach de-

75. Paredes v. Curtis, 864 F.2d 426 (6th Cir. 1988).
76. 419 U.S. at 584.
77. Reasoner v. Meyer, 766 S.W.2d 161 (Mo. Ct. App. 1989).

tected alcohol on his breath. That the student had consumed the beer with his parents' permission was irrelevant to school officials, who punished him under the provision of a school code that prohibited students who "were under the influence" from attending school. An appeals court overturned the student's suspension from school and the district appealed. The Ohio Supreme Court, by a 4-3 margin, held that the broad discretionary powers granted to local school districts conferred sufficient authority for the district to suspend the student, even given the facts in the case at hand. The dissenting opinion argued that the suspension should be set aside because there was no evidence that the student actually was "under the influence of alcohol" when he went to the afternoon practice.

An Alabama student who had been sent to the principal's office approximately twenty times in three years was expelled when he struck a fellow student. The student appealed the decision of a juvenile court that had upheld the expulsion, essentially asking the appeals court to find that the penalty was excessive. The appeals court observed that the student previously had been subjected to every punishment that the school system employed, but still continued to misbehave. The appeals court concluded that this record justified the expulsion.[78]

Corporal Punishment

All corporal punishment cases contain essentially the same set of facts. A student misbehaves or fails to perform to the satisfaction of a teacher. The student then is paddled and sustains what the student's parent or guardian believes is a severe injury. The school system disagrees and a court is left to determine if the injury was so severe that the paddled student's substantive due process rights were violated.

The Supreme Court held in *Ingraham v. Wright*[79] that corporal punishment was permissible and that the student plaintiff in that case, who had received twenty blows from a wooden paddle and lost the use of an arm for a week, was free to seek state and common law remedies for the injury. The Court, however, left unsettled the question of whether excessive force might in a future case constitute a substantive due process violation.

78. Scoggins v. Henry County Bd. of Educ., 549 So. 2d 99 (Ala. Civ. App. 1989).
79. 430 U.S. 651 (1977).

Since *Ingraham,* lower federal courts have used a "shock the conscience" test in weighing these substantive due process claims.[80] In a frequently cited Fourth Circuit case, the appeals court held that to sustain a substantive due process claim a court must find that "the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."[81] Given this standard, plaintiffs almost never are successful.

The parents of a nine-year-old student who was paddled seven times filed a substantive due process claim in a Kentucky district court.[82] A doctor and a policewoman had testified that the bruises the child received were "excessive," but the court concluded that they did not approach the level necessary to "shock the conscience." The parents were left free to pursue state court claims.

Factual issues left unresolved caused a Missouri district court to refuse to issue a summary judgment in favor of a school system in a more complicated corporal punishment case.[83] The district had a policy prohibiting corporal punishment, and the teacher in question had been reprimanded previously for striking a child. In the current incident, the teacher struck two children without warning, using a plastic baseball bat. The children suffered a variety of injuries when they were hit on the head and elsewhere. The district court concluded that this set of facts warranted consideration of the plaintiffs' substantive due process claims by a jury. The case was continued on the court's calendar.

A similarly distressing set of facts caused a Georgia appeals court to overrule a lower court and order a jury trial in a case that started when a principal broke a second-grade student's arm.[84] The student had failed to bring his homework to school and was brought to the principal's office for punishment. Depending on which version occurred, the crying student either was on the floor of the office and was jerked upright by the principal, breaking the arm, or the student struggled during the administration of the punishment and the arm was broken. The majority on the appeals court held that the factual dispute should be resolved by a jury. The minority argued that

80. This "test" originated in police brutality cases. *See* Rochin v. California, 342 U.S. 165 (1952).
81. Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980).
82. Brown v. Johnson, 710 F. Supp. 183 (E.D. Ky. 1989).
83. Turley v. School Dist. of Kan. City, Mo., 713 F. Supp. 331 (W.D. Mo. 1989).
84. Crews v. McQueen, 385 S.E.2d 712 (Ga. Ct. App. 1989).

the paddling itself was not excessive and that the broken arm should not be viewed as part of the punishment. Dissenting judges favored favored dismissing the case.

In another Georgia case, parents of a child who had "superficial" bruises from a paddling brought suit.[85] A psychologist attempted, unsuccessfully, to convince a lower court that the child suffered from "post-traumatic stress disorder" as a result of the paddling. Evidence that the child was laughing and playing shortly after the paddling was sufficient evidence for the appeals court to sustain a summary judgment in favor of the school district.

Bruises still visible after a week convinced a court that a student's paddling was excessive and that the names of those administering the punishment should remain on a list of "known child-abusers."[86] A social service agency had put the two school administrators on the list after concluding that the child did not bruise easily and that excessive force must have been used if the bruise remained after a week. In dissent, one judge observed that the agency's rules regarding "excessive force" were unwritten and that there was no actual evidence that excessive force had been used.

BILINGUAL-BICULTURAL PROGRAMS

The failure of plaintiffs to prevail with challenges to the adequacy of local school district bilingual programs may be the source of the decline in the volume of litigation seen in this area five years ago. In the single 1989 case in this area, plaintiffs representing non-English-speaking students again were unsuccessful.[87] The plaintiffs argued that the Berkeley schools had failed to provide adequate programs, thereby violating the Equal Educational Opportunities Act of 1974 (EEOA) and title VI of the Civil Rights Act of 1964.

The plaintiffs argued that the district had violated the EEOA by failing to provide qualified teachers, sufficient supporting resources, and necessary monitoring systems. They also argued that students were being passed from the program without receiving adequate bilingual programming. In weighing these claims, the district court used the criteria contained in a Fifth Circuit decision that have been

85. Mathis v. Berrien County School Dist., 378 S.E.2d 505 (Ga. Ct. App. 1989).
86. B.L. v. Department of Health and Rehabilitative Servs., 545 So. 2d 289 (Fla. Dist. Ct. App. 1989).
87. Teresa P. v. Berkeley Unified School Dist., 724 F. Supp. 698 (N.D. Cal. 1989).

used since 1981 by courts in cases challenging language remediation programs.[88] To pass muster, a bilingual program must be informed by sound educational theory, must employ methods that are reasonably calculated to implement the theory, and must produce results showing that the student's language barriers are being overcome.

In the eyes of the district court reviewing Berkeley's program, the theory used by the system was "manifestly as sound" as that proposed by the plaintiffs. As to the program's implementation, the court found that the near-bankruptcy of the system precluded the spending of the resources called for by the plaintiffs and it refused to order that additional resources be spent. The court also held that the students' test scores suggested that they were doing as well as other students in similar California programs. In addition, the court rejected the plaintiff's title VI challenge, asserting that they had failed in the requirement to show discriminatory intent on the part of the system.

DESEGREGATION

The number of cases concerning school desegregation remained constant in 1989, with most involving disputes in the implementation of desegregation plans. The cost of remedies was the central issue in many of these cases. Three other cases involved challenges to school transfer policies that were alleged to encourage the movement of white students away from schools with large minority populations.

Cross-district Remedies

School district policies that permitted "zone jumping," the transfer of white students out of predominantly minority schools into those with more white students, were reviewed by the Eleventh Circuit. In a series of unpublished decisions, a district court had held that the transfers should be permitted because they had only a slight effect on the racial composition of the schools in question. The appeals court reversed, holding that the cumulative effect of the transfers on the schools' racial composition, just under 10%, was not the only factor that needed to be considered.[89] Based on previous de-

88. Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).
89. United States v. Lowndes County Bd. of Educ., 878 F.2d 1301 (11th Cir. 1989).

cisions, the court observed that a "qualitative" analysis also was required to determine whether a school was assuming a "racial identity."[90] Looking at the transfers from that perspective, the appeals court held that some schools in the area were in danger of being known as "white schools" and that the transfers therefore were constitutionally impermissible.

A Mississippi city joined the federal government in requesting the consolidation of the city and county school districts, arguing that illegal guardianships were being used to facilitate white student transfers to the county district.[91] In addition to the guardianships, made only for the purpose of creating a school address different from the one where the student actually resided, some white students attending the county schools were listing fictitious addresses. Testimony in the case revealed that the county district made no attempt to verify student addresses, though the district previously had assured the Office of Civil Rights in writing that it was, in fact, making the checks.

In spite of this evidence and the district court's comment that consolidation would be "beneficial" to the districts, the court refused to find a constitutional violation. The court held that the lack of student address verification resulted in a lack of information that precluded the court from deciding that the transfers were of such significance that judicial intervention was needed. The court neither ordered the district to collect the data nor considered the "racial identity" issue presented in the previous case.

Plaintiffs in the long-standing Kansas City, Missouri, desegregation case attempted to force suburban school districts to admit minority transfer students by filing a separate lawsuit. The plaintiffs argued that genesis of their action originated in a footnote to a 1986 Eighth Circuit decision in the Kansas City case. The footnote stated that the failure of a district to participate in an interdistrict transfer program could be evidence of a constitutional violation.[92]

In viewing the plaintiffs' case, however, the court could find no evidence that the students seeking transfer had been treated any differently that any other prospective transfers, or that they had been denied a transfer based on their race.[93] Using strong language,

90. *See* Lee v. Eufaula City Bd. of Educ., 573 F.2d 229 (5th Cir. 1978) (composition of schools after student transfers and a qualitative judgment concerning the effect of transfers on desegregation both must be considered).

91. United States v. State, 719 F. Supp. 1364 (S.D. Miss. 1989).

92. Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1986), *cert. denied sub nom*, Kansas City, Mo. School Dist. v. Missouri, 108 S. Ct. 70 (1987).

93. Naylor v. Lee's Summit Reorganized School Dist. R-7, 703 F. Supp. 803 (W.D. Mo. 1989).

the court went on to conclude that the plaintiffs, in fact, had failed to present "any evidence to suggest that this specific lawsuit had any basis in fact or in law." The court then granted the defendants' request that their court costs be paid by the plaintiffs.

The question of which party must pay for various components of the St. Louis desegregation plan continued to be argued in 1989, with the state seeking to limit its financial role in supporting the interdistrict transfer of 15,000 students. The state sought to terminate its support of individual local school district desegregation efforts once a suburban district had reached its goal under the court-approved plan, even though the cumulative 15,000 student goal had not been reached. In the first of two 1989 Eighth Circuit decisions that addressed this issue, the appeals court upheld the state's position and permitted the halt in funding to districts that had exceeded their individual goal.[94] After a request for "clarification" from the district court, however, the appeals court withdrew its first opinion and issued a revised opinion ordering the state to continue the payments.[95]

The district court hearing the St. Louis case also reviewed an unsolicited student reassignment plan submitted by the state.[96] The court had ordered the city board to prepare such a plan, but the state stepped in and presented a plan that the court characterized as "contravening" the court's previous directives. The plan proposed the closing of thirty-four schools and, while it was cost-effective, the court found it "too drastic" and lacking "a human touch." The plan also contained a number of obvious mathematical errors which undermined its reliability from the court's perspective. To resolve the assignment issue, the court directed the state to join with the local district, relinquishing their previous "antagonistic attitudes" toward one another, to develop a reassignment plan for the 1990-91 school year. If the attempt failed, the court expressed its intention to select an independent committee to carry out the job.

A settlement in the Little Rock desegregation dispute involving three districts relied on the passage of state funding legislation. Unfortunately, the funding was held up by a series of events that a district court characterized as "bizarre." In the meantime, the district court refused to find that the state funds were available to fund the settlement.[97] The court went on to appoint a supervisor who would

94. Liddell v. Board of Educ., St. Louis, 873 F.2d 191 (8th Cir. 1989).
95. Liddell v. Board of Educ., St. Louis, 882 F.2d 298 (8th Cir. 1989).
96. Liddell v. Board of Educ., St. Louis, 718 F. Supp. 1434 (E.D. Mo. 1989).
97. Little Rock School Dist. v. Pulaski County Special School Dist., 716 F. Supp. 1162 (E.D. Ark. 1989).

have the responsibility for developing a workable student assignment plan. The court also approved a series of recommendations from the special master overseeing details of the desegregation plans already being implemented in each of the districts.

A Virginia plaintiff brought an action seeking to have the Secretary of Education halt all federal funds granted to the state of Virginia until changes were made in the educational program offered to the plaintiff's child.[98] The court dismissed the plaintiff's title VI claim for lack of subject matter jurisdiction, holding that the termination of funding would encroach on the powers of the federal executive and legislative branches. The court also found that the plaintiff lacked standing to bring the suit because the cutoff of aid would not assure that the alleged discrimination would necessarily end, even if the funding ceased.

Desegregation Plan Oversight

Cases involving the oversight of desegregation plans move back and forth between federal district courts and courts of appeal, often rapidly, as local adjustments to plans are made and challenged. In many of these cases, claims that a school district has achieved unitary status and should be relieved of court supervision are considered. The Supreme Court has never spoken clearly with regard to the standards that lower courts should use in considering such claims, and the standards vary substantially from circuit to circuit.[99]

The question of whether a school district must achieve desegregation in all areas, such as student and staff assignment, simultaneously, or could do so piecemeal, was at issue in 1989 cases. So too was the issue of whether a previously declared unitary system still must comply with injunctions. Federal courts of appeal have been divided on both issues.[100]

The Eleventh Circuit Court of Appeals considered the question of piecemeal compliance and unitary status in a case involving the DeKalb County, Georgia, school district.[101] A district court had held that the system had not achieved unitary status because its assignment of teachers and administrators still showed substantial racial imbalance. The same court, however, had dismissed the school system from court supervision in the area of student assignment. The

98. Abramson v. Bennett, 707 F. Supp. 13 (D.D.C. 1989).

99. *See* Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 Harv. L. Rev. 653 (1987).

100. *See* The Yearbook of Education Law 1988 at 98-9.

101. Pitts v. Freeman, 887 F.2d 1438 (11th Cir. 1989).

appeals court overruled the lower court on the assignment question, holding that a school district must simultaneously and for three years meet all six factors in *Green v. County School Board.*[102] The areas where racial balance must be found are student assignment, faculty, staff, transportation, facilities, and extracurricular activities.

The Eleventh Circuit also overruled a district court that had found that the Duval County, Florida, schools had achieved unitary status.[103] The appeals court found that teacher and administrative staff assignments closely matched the white-to-black ratio in each school, such that segregated schools also had segregated staffs. In addition, the use of portable classrooms and leases perpetuated the existence of mostly one-race schools.

A Mississippi district court considered a motion made on behalf of the Choctow County school district that its schools be declared unitary.[104] The court rejected the motion, finding that evidence suggested continued segregation in four separate areas of the system's operation. The court also awarded back pay to a minority staff member who three times had been passed over in favor of white candidates when seeking a principalship. The former principal, who lost his job when schools were combined to facilitate desegregation, was entitled to the job under the requirements of a 1969 Fifth Circuit decision regarding staff displacement.[105]

A federal district court and the Tenth Circuit Court of Appeals continued to reach opposite conclusions regarding desegregation in Oklahoma City. The appeals court held in 1986 that while the district had been declared unitary a decade earlier, the failure of the lower court to dissolve its desegregation decree meant that the case could be reopened without a new finding of segregative intent on the part of the school system.[106] In a 1987 decision ignoring the appeals court, the lower court persisted in placing the burden of proof on the plaintiffs to show that residential patterns rather than board action were not the cause of segregated schools. Again the appeals court reversed.[107] In its latest decision, the appeals court once more lectured the lower court on how to review the case, telling it to abandon its

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102. 391 U.S. 430 (1968).

103. Jacksonville Branch, NAACP v. Duval County School Bd., 883 F.2d 945 (11th Cir. 1989).

104. United States v. State, 725 F. Supp. 307 (N.D. Miss. 1989).

105. Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211 (5th cir. 1969), *cert. denied,* 396 U.S. 1032 (1970).

106. Dowell v. Oklahoma City Pub. Schools, 795 F.2d 1516 (10th Cir. 1986); *see* The Yearbook of Education Law 1989 at 90-1.

107. Dowell v. Board of Educ. Oklahoma City Pub. Schools, 677 F. Supp. 1503 (W.D. Okla. 1987), *vacated and remanded,* 890 F.2d 1483 (10th Cir. 1989).

consideration of discriminatory intent and to focus its efforts on evaluating the district's assignment plans.

A Georgia court considered a proposal made by the Savannah schools to end that city's longstanding desegregation dispute.[108] The board plan relied on the use of revised attendance zones, magnet programs in predominently black inner-city schools, and a majority-to-minority transfer plan to desegregate predominantly white schools. Plaintiffs in the case criticized the plan for placing an excessive burden on black students and for relying too heavily on voluntary techniques. The court disagreed, affirming the plan and praising it for its use of "ambitious yet realistic" goals.

An appeal of the Savannah decision was filed and the Eleventh Circuit affirmed with minor modifications.[109] The federal government, in its brief, asked for increased integration within the magnet schools so that white students would come in contact with more minority students in nonmagnet courses. The appeals court asked the lower court to incorporate this recommendation in its final order and to consider the use of some magnet programs in mostly white schools.

The attempt by the federal government to have a number of Georgia school districts declared unitary continued in 1989. The government filed the request without the consent of either the plaintiffs or the defendants in the original cases. Both sides were perfectly happy to remain under court supervision and had no interest in reopening the long-dormant litigation. After the United States agreed to pay certain of the costs associated with litigation on unitary status, a district court declined to dismiss the case.[110] The court, however, characterized the government's position as "riddled with inherent conflicts" because the Department of Justice refused to say at the outset that it might not change its mind regarding the appropriateness of unitary status once the case commenced.

The Buffalo school district, relying on city school appropriations under New York's school finance law, filed suit against the city to obtain additional funds for desegregation programs. The district court monitoring the protracted dispute refused to order the funds, finding that the district had long failed to follow court instructions regarding the documentation the court needed to review the issue.[111] The board's financial statements were described as "voluminous, incon-

108. Stell v. Board of Pub. Educ., City of Savannah, 724 F. Supp. 1384 (S.D. Ga. 1988).
109. Stell v. Savannah-Chatham County Bd. of Educ., 888 F.2d 82 (11th Cir. 1989).
110. United States v. State, 702 F. Supp. 1577 (M.D. Ga. 1989).
111. Arthur v. Nyquist, 716 F. Supp. 1484 (W.D.N.Y. 1989).

sistent, confusing, and misleading." The city also argued that the system had failed to follow state procedures for requesting an emergency appropriation. While a court-appointed accountant was able to make some sense out of the district's finances, the data were not sufficient to convince the court to order additional funds when the district books were in such disarray.

The Fifth Circuit approved a district court order ending busing to reduce segregation in the sprawling Fort Worth school district.[112] The school district is becoming increasingly populated by minority students, and the lengthy bus trips, averaging over an hour, had not proved successful in maintaining racial balance in the district. The appeals court was persuaded by data showing that fewer white students would leave the district if the busing were to be halted. At the program's termination, fewer than 2% of the district's students were bused.

Litigation involving desegregation in Fort Worth, spanning almost thirty years, shows promise of coming to a close. A district court reviewed the progress made toward desegregation, including data showing that the district spent more on minority students and had made impressive progress in achieving equality in staff hiring. Plaintiffs in the case also offered no concrete suggestions on further remedial actions that might be taken. The court concluded that the system was unitary and that it would be released from court supervision in three years.[113]

The Fifth Circuit affirmed a lower court decision finding that the Oxford, Mississippi, school district had achieved unitary status.[114] Plaintiffs in the case challenged the decision on the grounds that segregation still was apparent in several areas, including discipline, employment, and extracurricular activities. But the appeals court was unpersuaded, characterizing the plaintiffs' arguments as representing "preferences" regarding school policy rather than as evidence of continuing constitutional violations.

State Court Cases

Several state court cases reported in this section in recent years have focused on the powers of state civil rights commissions to investigate complaints arising in schools where a desegregation plan is in force. State courts have been less than enthusiastic about opening a

112. Flax v. Potts, 680 F. Supp. 820 (N.D. Tex. 1988), *aff'd*, 864 F.2d 1157 (5th Cir. 1989).
113. Flax v. Potts, 725 F. Supp. 322 (N.D. Tex. 1989).
114. Quarles v. Oxford Mun. Separate School Dist., 868 F.2d 750 (5th Cir. 1989).

second forum for desegregation cases beyond that already afforded by state courts, generally concluding that the jurisdiction of commissions as enumerated by state laws do not extend to desegregation disputes.

In a 1989 state court case, a mother filed a human relations commission complaint alleging that her son had been discriminated against while attending a mostly white magnet school. A lower court ruled against the plaintiff on a technicality, holding that the complaint had not been filed within the required ninety days. An equally divided Pennsylvania Supreme Court allowed the lower court ruling to stand, thereby sidestepping the jurisdictional issue.[115]

115. Pennsylvania Human Relations Comm'n v. School Dist. of Philadelphia, 562 A.2d 313 (Pa. 1989).